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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-717

NELSON BUNKER HUNT AND WILLIAM HERBERT HUNT,
*Petitioners,*

v.

PAN AMERICAN ENERGY, INC., a North Dakota corporation, MOBIL OIL CORPORATION, a New York corporation, and MELVIN ("PAT") BALLANTYNE,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF BY RESPONDENT MOBIL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES



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### QUESTIONS PRESENTED

The questions presented by Hunts are concerned with whether the courts below were doing an acceptable job technically. Specifically, the attack of the Hunts is based on the allegation that the 8th Circuit Court needs supervision because:

> . . . the courts below apparently felt no need to carefully formulate the issues. They did not, in fact, ever define or address the true issues in this cause. (Petition for Writ, 10)

The two "questions presented" which Hunts put forward are not meaningful issues in this case; but if they must be discussed, the language and context should be altered. We will discuss, in detail, later in this brief the fact that Hunts' chosen issues are not meaningful. Suffice it to say here that the language the Hunts have chosen arises from the following:

1. The first purported "question presented" arises from (a) Hunts ignoring portions of the opinion below and (b) the Hunts' failure to brief issues or to ask the appellate court to consider relief in the form of damages; and

2. The second supposed "question presented" develops from the Hunts (a) misreading the opinions below, and (b) ignoring those portions of the opinion which make it clear that the several judges, after sifting through the thousands of documents and hundreds of pages of testimony, felt that decision was unaffected by the relatively minor point the Hunts are concerned about.

We think that the questions presented—if indeed there is any merit at all in Hunts' case—should be phrased to ask:

1. Whether the appellate court's opinion responded to the issues briefed and the request for relief addressed to it by Hunts, and

2. Whether, after the appellate court was asked by Hunts to find the facts anew, it erred in failing to remand after its finding that the trial court erred on one minor point, when the appellate court judges considered the decision independently sustained by evidence on more relevant issues.



## REASONS FOR NOT GRANTING THE WRIT— SUMMARY OF ARGUMENT

This is a case which turns on the trier of facts' assessment of thousands of exhibits and two weeks of testimony. The courts below found facts which dispose of the case on independent grounds, but plaintiffs Hunts are ignoring those facts. The issues to be decided, and the items to be discussed, depend upon an appreciation of the evidence.

Furthermore, issues not presented to the courts below cannot be raised now. The Circuit Court disposed of, and responded to, the issues presented to it. The complaint against Mobil (and even the amended complaint presented by the plaintiff after trial to conform the pleadings to the evidence) does not allege any tort committed by Mobil and only seeks a constructive trust against the leases held by Mobil. In the courts below, the plaintiffs never attempted to argue that the courts of North Dakota might adopt a different standard of proof if some remedy other than a constructive trust was sought. The indications are that the North Dakota court would hold that the standard of proof would be the same in any case of obtaining property unfairly. However, we do not at the United States Supreme Court level reach the issue of what the North Dakota court might do, because that issue was not presented to the Circuit Court below.

Moreover, the issues suggested in the Petition for Writ of Certiorari are false issues; and they simply do not exist in the case. As is discussed in detail in this brief, the issues suggested by the Hunts arise from their unwillingness to understand certain pieces of evidence or to appreciate and accept the factual finding of the courts below: that there simply was no causal connection between anything the Hunts owned and the leases which

Pan American obtained. Factual determinations dispose of this case.

In any event, the claimed issue of what North Dakota law might be, and the claimed issue that in this instant case the courts below did not understand the evidence they were reviewing, are not issues of national gravity or significance.

**1. The courts below assessed the mass of evidence and found facts which dispose of the case but which Hunts ignore.**

If the reader feels that this brief seems to describe a different case than that which Hunts presented in their statement, it is perhaps because this is a lawsuit involving thousands of exhibits and hundreds of pages—two solid weeks—of testimony. Reducing this testimony into a short summary creates distortions; however, we will try to be brief but accurate. If the reader desires a longer summary, we would suggest that the trial court and appellate court decisions compressed the facts into manageable outlines, and their opinions may be referred to for a fuller—although still much abbreviated—description of the case.

This case involves a period of intensive coal land leasing in the state of North Dakota. In the words of one witness: "The country was loaded with people, couldn't get rooms in motels, rigs all over the area, coal detection rigs." (Transcript V, 106)[1]

There was a plethora of geological information publicly available concerning coal deposits in the state of North Dakota. As a result, many companies worked in the same areas. The plaintiff Hunts and the defendant Pan American Energy, Inc. (Pan Am), were but two

[1] References to the transcript are to volume by Roman numeral, followed by the page in arabic numerals.



of these companies engaged in leasing in many of the same area. (*See, e.g.*, exhibits reproduced at Transcript IX, 23-38.)

Hunts heard what their own brief characterizes as rumors that Pan Am leased because of Hunts' geological information; and motivated by these rumors, Hunts sued Pan Am.

Mobil Oil Corporation had never had business dealings with Pan Am prior to or during the times when Pan Am purchased the coal leases in dispute. Mobil was named as a defendant essentially because it had purchased the coal leases from Pan Am; and plaintiffs wished to impress a constructive trust upon those leases, and obtain title to them.

Hunts presented the case to the trial court on the theory that a major copying of Hunt drilling logs had taken place. Much testimony was devoted to these logs. It appeared that thousands of drilling logs produced in North Dakota were sent to the home office of Hunts in Texas almost immediately after they were produced, with no copies retained in North Dakota. The original logs were then kept at Hunts' home office in Texas. (Transcript, V, 231; V, 232; IV, 224) Only in rare and limited circumstances would an occasional copy of a drilling log return to North Dakota. (Transcript IV, 224) Therefore, unless you worked at the Hunts' home office (or just happened to be a field team laborer at the time and place a particular log was produced by a drilling rig), there was no opportunity to see or copy any logs.

The plaintiffs' theory at the trial court level was that a geologist named Mark Reishus from Hunts' home office had been the primary source from which Pan Am (and its principal officer, Ballantyne) had obtained confidential Hunt information. The following quotation sums up

the trial court's finding on this matter. (Note that the trial court findings are on a preponderance of the evidence—not on the clear and convincing standard which Hunts argue, in their Petition for Writ of Certiorari, to have been all that was used by the courts below.) The trial court stated:

> Plaintiffs have presented their case on the theory that Mark Reishus was the primary source from which Ballantyne obtained confidential Hunt information. *The fair preponderance of the evidence before this court is not sufficient to support such a theory.* (Emphasis supplied.) (Appendix 42)

The trial court made a specific finding that:

> Reishus' testimony and demeanor at trial was forthright and credible . . . (Appendix 42)

That finding as to credibility of Reishus, as a witness presenting oral testimony, is important because that testimony was:

> Q. Mr. Reishus, have you ever given confidential Hunt information to Pat Ballantyne or anyone associated with Pan American?
>
> A. I have never given confidential information to anyone. (Transcript V, 293)

The 8th Circuit judges, after reviewing the evidence, likewise made a finding having little to do with a "clear and convincing standard" that plaintiffs have complained about. The finding of the appellate court was:

> Moreover, we are of the opinion that the evidence presented to implicate Reishus in the allegedly unlawful scheme of the Ballantynes has *little, if any, probative force* when the record is considered in its entirety. (Emphasis supplied.) (Appendix 87)

In Hunts' present statement of the case, the name Reishus (the principal accused at the trial) is found only once—in an incidential reference to the fact that he and another man were geologists for the Hunts. Having been soundly defeated at the trial court level on



their theory regarding the person who had access to the drilling logs at Hunts' home office, plaintiffs at this late stage turn their attention to one Todd Ballantyne as the alleged primary source.

Todd Ballantyne, a college student and son of one of the Pan Am principals, had worked for Hunts as a laborer in the field—not in the office—during a vacation from college. The statement by the Hunts in their petition (at page 4) that "Todd had access to all of their geological information," is not correct. Although thousands of logs were produced in North Dakota, they were mostly produced *before* Todd worked for Hunts; they were sent to Texas almost immediately after being produced; and no copies were retained in North Dakota. During the limited time Todd worked as a laborer with the drilling rigs, *no* logs were produced for most of the areas in question. Todd worked only in parts of four counties. For those few months, Hunts' entire organization in North Dakota produced only sixty-four logs (Exhibit #6031; Transcript IX, 21); of those sixty-four logs, only nineteen showed coal in commercial quantities; and furthermore, Todd's team was not even involved in all of the drilling and logging work on those nineteen logs. Small wonder that, at the trial court level, Hunts argued it "must" have been their home office employee Reishus who gave out secret information kept at the Texas home office. It would have been ridiculous, at the trial court level, to try to prove that hundreds of leases across a dozen counties had been obtained because a Hunt laborer (Todd) knew about a handful of logs in four counties. Yet, that is what we now hear argued by Hunts to this Supreme Court, in their petition arguing that the courts below did not address the true issues!

Todd worked in the field as a logger—not in the office, and not in the buying department. Hunts' "buy area" maps were kept in their office at Williston, North

Dakota. Most of the time, Todd was headquartered working out in the field, in country areas *a hundred miles away*! Furthermore, the Williston office was tended by other people of the Hunt organization at all times. No Hunt employee testified that Todd Ballantyne kept "dropping in," or was rummaging around in the Williston office looking at things he would not normally see in his job.

Plaintiffs' chief home office executive officer in direct and complete charge of geologists (the department Todd worked for in the field); and of the landmen (the department which had buy area maps and did the leasing); and also of the entire coal leasing program and the Williston office in North Dakota, was James Jordan. Jordan, this Hunt executive, testified that Todd and other Pan Am people did not have the buy area maps which Hunts urge are involved:

> Q. In response to Mr. Thames' question you said *you do not think that the [secret geological Hunt] buy area outline was obtained by Pan American.* Why do you think that outline was not obtained?
>
> A. It was or would be and had been the practice in the past by oil companies to establish what somebody's buying outline might be by going to the courthouse. (Emphasis supplied.) (Transcript V, 143-144)

If Hunts' chief responsible executive agrees with defendants that Pan Am did not obtain buy area maps of Hunts, we think the courts below were addressing the correct issues in deciding that the exact amount of Todd's access made little difference in the disposition of the case, and in focusing on whether Hunt materials were actually used by Pan Am in its leasing.

We should also note that the statement in Hunts' petition that Todd "admitted making and taking copies



of the Hunts' logs without permission" is true as far as it goes, but it is definitely misleading. The evidence merely showed that Todd, a college student, took a few copies of logs when returning to school—copies he had made as souvenirs to show his friends. He had been told that these copies he took were of no commercial value, and the Hunt geologist testifying at the trial for Hunt agreed that they were of no commercial value. (Transcript III, 160-162; III, 190-191; IV, 219-220)

As to Todd Ballantyne, the appellate court reviewing the documents stated (and again, note that this is *not* a matter of "not found clear and convincing," but rather an affirmative finding of the preponderance of the evidence favoring the defense):

> Moreover, *the evidence was that Todd did not show his father the Hunt information* [the logs or drilling location information] he retained until after the Ballantyne leases were purchased. . . . (Emphasis supplied.) (Appendix 84)

The complaint presented to this Supreme Court is that the courts below utilized only a "clear and convincing" standard in assessing evidence. As noted above, the courts stated findings phrased not only in terms of the failure of the plaintiffs' proof, but also phrased affirmatively as to what the defense evidence proved.

Turning now to the issue of proximate cause and whether Pan Am's leases sought by Hunts were based on Hunt information (assuming for purposes of argument that Pan Am had some Hunt infomation in an unexplained manner): this was clearly considered by the trial court:

> The court: "Well, it seems to me that the *ultimate issue in this case is where the defendants*, particularly defendant Pan American and Ballantyne, *acquired the information which was used as a basis*

> *for procuring the leases* . . . and on that basis the court is going to overrule the objection." (Emphasis supplied.) (Transcript III, 40)

On the issue of what was used by Pan Am to obtain leases, the specific, positive finding of the trial court was that:

> The Pan American leasing program was a flexible non-structured operation adapted in each area to the information Ballantynes were able to accumulate. It admittedly involved a great amount of guesswork. *But the pattern of leasing was based on reading public information, observing drilling activity in these areas, examining courthouse information, noting old or existing coal mines, visiting with the landowners and buying in between the majors.* (Emphasis supplied.) (Appendix 54)

The Hunts, in their Petition for Writ of Certiorari, create false issues by their strange clinging to their own unique interpretation of facts. For example, at page 11 of the petition, it is stated:

> The courts below rely heavily in their opinions on the fact that persons could have observed the Hunt drillers and loggers as they worked in the field. If this fact is of any significance whatsoever, it is for its implication that *the information which resulted* from the Hunt exploration in North Dakota was not secret . . . . Therefore, the courts, without considering the point, inadvertently held that North Dakota does not adhere to the doctrine of relative secrecy. (Emphasis supplied.)

Hunts then go on to discuss the doctrine of relative secrecy of the paperwork "information which results" from drilling, as though that were something at issue. The point is: the Hunts are wrong in saying that the courts below could only have thought observation of Hunt drillers was important because the "information



which resulted" (logs and maps) was not secret. Instead, the courts were pointing out that the physical presence of large coal drilling rigs (not considered secret even by Hunts) in an area was one of several public, legitimate sources of information.

For an example of how the trial court was *not* using the doctrine of relative secrecy in regard to Hunt buy area maps or logging information, see the trial court's opinion at page 24 of the Opinion, Appendix page 52. The trial court and appellate court were not "inadvertently" discussing the relative secrecy of Hunts' papers (maps and logs); but rather, they were talking about the legitimate compiling of information, in the same way that even Hunts compiled information indicating where to lease. (Hunts themselves followed other companies' drilling rigs watching where they drilled.) The courts below were faced with an argument by Hunts that the "only way" Ballantynes would have bought where they did was through secret papers (logs and maps.) Obviously, there were perfectly legitimate ways for anyone to find out where to buy leases: one of which was watching the many companies' drilling rigs in the countryside—without having Hunts' logs and maps.

The plaintiffs, at their petition, page 13, allege that they "proved that they had been damaged by defendants' commission of the tort of misappropriation of trade secrets." No such thing has been proved! On the contrary, as noted, the trial court found no proximate cause between any Hunt information and the leases Ballantyne purchased.

Most of the Ballantyne leases were purchased in areas outside the Hunt buy area—in the very areas where Hunts' secret information showed there was no coal. One can hardly see how the plaintiffs were damaged if the specific finding is that Ballantyne purchased where

Hunts' secret information showed it was useless to purchase; and indeed, the defense evidence was found to show affirmatively that Ballantyne's purchases had been based on legitimate information, not Hunts' secret information.

The trial court's affirmative finding, on a preponderance of the evidence for the defense, that the Pan Am leases were based on legitimate information, has not been declared to be clearly erroneous by the Circuit Court. On the contrary, the Circuit Court in analyzing individual areas supported the trial court with statements like that which follows concerning the Sawyer-Velva area, the area of most of Pan Am's leases:

> The Hunts . . . point to *no positive evidence* in the record, either of a direct or certain substantial nature, *that supports the proposition that the Ballantynes used Hunt data in this area.* (Emphasis supplied.) (Appendix 90-91)

In short, the Hunts are disappointed plaintiffs on findings of fact. They choose to ignore those portions of the opinions below which find (1) that the accused did not take information; and, (2) as an independent and separate ground for dismissal of the complaint, that the Pan Am leases were acquired because of legitimate public information—there being no causal relationship between Hunt data and Pan Am leases.

**2. The Appeals Court disposed of, and responded to, the issues presented to it (and issues not presented to it cannot be raised now.)**

Plaintiffs' argument that they should be allowed a new trial to see if they can get damages is clearly not appropriately used against Mobil. In their complaint against Mobil, no wrongful act of misappropriation—no tort—was alleged. The only allegation against Mobil was that "if Mobil Oil Corporation has acquired



such leases, then in that event they hold them in trust for the use and benefit of plaintiffs." And the only prayer for relief against Mobil was a prayer for a constructive trust.

Even in their amended complaint, after the trial, to conform the pleadings to the evidence, dated March 21, 1975, the plaintiffs did not allege any tort by Mobil. They did not ask for damages against Mobil, but only that a constructive trust be imposed upon Mobil. Furthermore, the court denied, by its order of August 18, 1975, any attempts to change the original prayer for relief; and this has never been claimed as error in briefs to the Circuit Court.

It is therefore clear that Hunts' whole present argument, that the courts below should be supervised to consider damages issues, is inappropriate and untimely as against Mobil. Clearly at this late date, in the Superior Court, plaintiffs cannot be allowed to amend their complaint against Mobil to insert a claim for damages and to assert some tort committed by Mobil.

The obvious reason why the opinions below discuss "clear and convincing" and point out that the plaintiffs have failed in that regard, is because the plaintiffs' briefs to the courts below kept insisting that was the standard Hunts had met for relief against *all* defendants. Hunts argued to the appellate court that they had established matters against all defendants by "clear and convincing proof," and that the trial court was erroneous in its contrary affirmative findings.

It was in that context that the appellate court responded. At one point the 8th Circuit Court responded to Hunts not only by saying that Hunts had failed completely on one issue, but also by adding a pointed comment about Hunts' argument that their case was proven by clear and convincing evidence:

> *The Hunts . . . point to no positive evidence* in the record, either of a direct or certain substantial nature, that supports the proposition that the Ballantynes used Hunt data in this area. Instead, they argue. . . . *We*, like the district court, *do not consider argument to be clear and convincing proof.* (Emphasis supplied.) (Appendix 90-91)

As we have noted before in this brief, the trial court made affirmative findings that Pan Am's leases were *not* based on Hunt data, but rather on legitimately and separately acquired information.

Further, as we have noted before in this brief, the trial court made affirmative findings of fact based on what it described as a preponderance of the evidence, that the person who had access to the drilling logs kept in Texas (Reishus) did not transmit any confidential information. The further discussions by the courts below about "clear and convincing proof," and the plaintiffs' failure to meet that burden of proof, must be read in the context of Hunts' briefs to the courts below: in which Hunts asserted that they had established a right to a constructive trust against all defendants.

Moreover, North Dakota statutes provide that there is no common law in any matter where the law is set forth by the code. N.D.C.C. 1-01-06. It might well be that where property is gained by fraud or other wrongful acts, the action for constructive trust and accounting is the only one authorized by North Dakota law. North Dakota statute N.D.C.C. 59-01-06 provides that one who gains a thing by wrongful act is an implied trustee; and further provisions allow for accounting of profits, replacing, or returning the property. The code does not provide for actions for damages in constructive trust situations.

What the North Dakota Supreme Court might hold if the issue of damages or burden of proof were pre-



sented to it has certainly never been mentioned earlier to the courts below. It strikes one forcibly that none of the cases now cited by Hunts as to burden of proof are found in their briefs below. Certainly there are cases indicating that the degree of proof when unlawful use of trade secrets is alleged is the same, whether damages or injunctive relief or accounting or constructive trust is alleged. Surely, it would not make sense to the layman to hear that a court has said a man could hold property as his own, but would have to pay damages for it not being his property. A number of cases around the country have taken the common sense approach and held that even when constructive trust is not sought, a stronger degree of proof than mere preponderance is required. It has been held that in unfair competition cases the right to relief must be established by "clear preponderance of the evidence"; or that the testimony should be "direct, clear and positive" or "clear and convincing." *Soft-Lite Lens Co.* v. *Ritholz*, 21 N.E.2d 835 (Ill. 1939); *Zangerle and Peterson Co.* v. *Venice Furniture Novelty Manufacturing Co.*, 133 F.2d 266 (3rd Cir. 1943); *Eli Lilly and Co.* v. *William R. Warner and Co.*, 268 F. 156 (D.C. Penn. 1920); *Mycalex of America* v. *Penco Corp.*, 159 F.2d 907 (4th Cir. 1947).

Cases involving the question of unfair use of trade secrets require a judgment on the use of business information in areas where Congress has chosen not to give patent-or copyright-style protection. Hence, the courts traditionally have sought impelling reasons to act where the legislature has thought it unwise to provide protection. The nature of the requirement of something more than mere preponderance of the evidence arises out of the nature of the cases where unfair use of trade secrets is alleged, and not from the simple fact that a constructive trust is involved. But discussions of what that burden of proof consists of (and whether it is

greater or less for the same wrong, but differs upon the relief requested for the wrong) cannot be made for the first time to this Court.

In a footnote in the Circuit Court opinion, the Circuit Court noted that Hunts could not bring before that court issues which had not been presented to the trial court. (Appendix 77) In like manner, Hunts cannot now ask the U.S. Supreme Court to superintend the job of the circuit courts, by requiring the 8th Circuit Court to consider awarding damages when no such request was argued or briefed to the Circuit Court.

In general, where a cause has been brought up for review from an intermediate court of appellate jurisdiction to a higher court, the only issues properly before the higher court are those presented to, and passed on by, the intermediate court. This proposition is so well established in American law that citation of authority for it is unnecessary. The reason for such a rules lies in numerous matters of public policy and fairness.

A party is not allowed to try his case piecemeal—presenting to some courts one theory and to another court another theory—and then attack the lower courts for not doing what was never asked of them.

Rule 28(a)(5) of the Appellate Rules requires that the appellant's brief to the Court of Appeals shall concontain: "A short conclusion stating the precise relief sought."

Hunts' "short conclusion stating the precise relief sought" in their brief to the Appellate Court was as follows:

> Plaintiffs earnestly contend that when "the qualitative factor of the truth and right of the case" is considered, this Court must be left with the "impression that a fundamentally wrong result has been reached." *The Hunts further contend that this Court may and should substitute its judgment for that of the Trial Court, correctly find the facts of this case from the evidence adduced* and remand the case to the Trial Court with instructions to enter judgment for the Hunts, *and impress upon the leases held by Mobil, and purchased from Pan Am a constructive trust in favor of the Hunts.* (Appellants' Brief to 8th Circuit, 56)



The plain fact is that the appellants Hunts never sought from the Court of Appeals damages or a consideration of a different standard of proof for damages; and they never argued that on a different standard of proof they could obtain damages. At the 8th Circuit bar, Hunts never asked the court to consider the issue of liability for damages or some lesser standard for imposition of damages; or argued that the trial court was in error in not specifically discussing damages. The argument Hunts made to the appellate court was simply that the trial court had made a wrong decision as to what the *facts* were, and that the trial court had not drawn the inferences that Hunts wanted drawn; and Hunts wanted direct contrary judgment on the facts from the Circuit Court.

In that portion of the Appellants' Brief to the 8th Circuit headed "The Court Did Not Properly Impose or Apply the Burden of Proof," pages 18-21, Hunts' only objection to the trial court finding was that the trial court seemed to have an overly cautious attitude as to the plaintiffs' proof. The word "damages" *does not even appear.*

As far the Hunts' present idea of remanding to the trial court is concerned: at the Circuit Court level Hunts contended that the appellate court should itself become a direct finder of fact, "correctly find the facts in this case from the evidence," and not remand for new trial. (Appellants' Brief to Circuit Court, 56)

The Supreme Court, on certiorari, does not discuss a petitioner's contentions which he failed to specify as errors in the Circuit Court below. *Sonzinski* v. *United States*, 300 U.S. 506 (1937).

Furthermore, another independent point should be made. All the talk in the world about whether Hunts have a choice between constructive trust and damages is seen as useless verbiage, when one considers *the affirmative finding that there was no proximate cause* between any Hunt information and the leases the Ballantynes purchased. It would be just as logical for us to complain about the fact that the trial court and the appellate court never discussed several affirmative defenses of the defendants, as it is for the Hunts to resent the trial court not discussing some of the issues that the plaintiffs might want to discuss. Such discussions simply were not required for a decision of the case.

Once the trial court made affirmative findings such as the following examples on the defense evidence of causation, it is unnecessary theorizing to talk about "what if" the trial court had *not* decided as it did; and to what level Hunts' proof would then have to rise:

> The Pan American leasing program . . . was based on reading public information, observing drilling activity in these areas, examining courthouse information, noting old or existing coal mines, visiting with the landowners and buying between the majors. (Appendix 54)
>
> The Ballantyne purchases are consistent with the general information given by the government data. They seem to be inconsistent with parts of the Hunt outlines which extend out of the area delineated by the government bulletin. . . . It would be logical to conclude Ballantynes were guided by government information. (Appendix 65)
>
> There is no evidence to show confidential Hunt data was used to obtain those leases. (Appendix 69)



The Hunts in their brief to the 8th Circuit stated that they wanted the 8th Circuit to:

> . . . substitute its judgment for that of the trial court, correctly find the facts in this case from the evidence produced and remand to the trial court with instructions to enter judgment for the Hunts . . . (Appellants' Brief, 56)

Although they said the above to the appeals court, now, in their Petition for Writ of Certiorari, the Hunts contend that the appellate court should not try a case de novo and "the Court of Appeals erred in doing so in this case." Apparently the reason for the shift in Hunts' position is that the appellate court, after examining the evidence, did not find the facts to be as Hunts imagined them.

Hunts' Petition for Writ of Certiorari says, at page 10:

> . . . . [T]he courts below apparently felt no need to carefully formulate the issues. They did not, in fact, even define or address the true issues in this case.

Mobil, on the other hand, would state that the courts knew quite well what the issues were. (Certainly after hundreds of pages of brief from the plaintiffs' side, the courts should know what the plaintiffs are driving at.) We respectfully suggest that the problem lies with the plaintiffs, who simply are unwilling to comprehend the significance of the courts' reasonings.

For example, page 12 of Hunts' petition states that, "[T]he opinions in this case to date indicate that the plaintiff in a case such as this now under consideration must prove by clear and convincing evidence that the defendant has not only appropriated the trade secret, but has *used it intelligently.*" (Emphasis is that of Hunts' petition.) The reason that the courts below pointed out that Ballantyne's purchases were not consistent with

Hunt information was assuredly not to argue that the law requires intelligent use of knowledge. Instead, the courts were rationally pointing out that the evidence indicated Pan Am (Ballantyne) had not used Hunt information. (If one has secret information showing where the coal is, one does not: buy where there is no coal but not buy where there is coal.)

In the appellate court, the Hunts argued that the trial court did not properly apply the burden of proof standard. The burden of proof which Hunts then insisted was appropriate was the burden of proof that they now attack. The Hunts said to the appellate court:

> The Hunts believe . . . that they have proven their entire case by clear and convincing evidence, as required by the court below. (Appellants' Brief to 8th Circuit, 18)

Not since was this standard attacked as the wrong standard. One looks in vain through the briefs submitted to trial and appellate courts for any presentation of the issues which are now brought before this Court as justification for exercise of the superintending powers of the United States Supreme Court.

It is well established that issues not argued are waived.

The Supreme Court of the United States was not established as a court to provide plaintiffs a new forum to argue about what North Dakota law was, when that issue was briefed neither to the trial court nor to the Circuit Court.

**3. The appeals court did not find the trial court clearly erroneous on two threshold issues, but rather only found what it considered one error on a minor subitem which did not change the conclusions regarding independent issues dispositive of the case.**

Hunts claim that the trial court was found to be clearly erroneous on what Hunts characterized as two threshold



issues. Hunts are mistaken. There were neither "two", nor were they "threshold" in the sense of being the only ways into the decision. We will discuss in turn the two items mentioned by Hunts.

The trial court found that Todd Ballantyne had only a minimal opportunity to acquire Hunts' buy area maps. The trial court, which has the responsibility of working in North Dakota, is painfully aware of the large distances involved in the state and the fact that the places Todd worked in the field were often 100 miles or more from Williston, North Dakota. If there were any Hunt buy maps, they were kept in the Williston office of Hunts, in connection with the "land department" having to do with the purchases of leases.

This case involved thousands of exhibits and hundreds of pages of testimony. Appellate courts should not try a case de novo, as Hunts requested the 8th Circuit Court to do. They frequently get into trouble in doing so. Although it is true that Todd, for a few days, did do some paperwork connected with the hole drilling, using a desk at the Williston office, his work did not involve the buy area maps. It certainly is significant that no Hunt employee from the Williston office was called to testify by Hunts, and no one testified that Todd would ever have had the buy area maps in his possession as a part of his job. We think the appellate court was clearly erroneous on the minor matter of what constitutes minimal, or more than minimal, access. It certainly presents a peculiar picture to the mind, to think of a common laborer driving a hundred miles to get to the Williston office, and then rummaging around in other peoples' desks for the buy area maps (which had nothing to do with his responsibilities) while the Hunt office people stood by smiling tolerantly at this type of behavior.

However, the question of whether or not Todd had "minimal" (trial court) or more than minimal (appellate court) access to buy area maps is somewhat irrelevant. It deteriorates to a dispute as to the definition of "minimal" access. More importantly, consider the *affirmative* finding of the appellate court that "*The evidence was* that Todd *did not* show his father the Hunt information he retained until *after* the Ballantyne leases were purchased in June, 1973 . . ." (Emphasis supplied.)

Regardless of any difference of opinion between trial court and appellee court as to what is "minimal" access by fieldworker Todd, it would have been ridiculous for the appellate court to send the matter back for a new trial, because of the appellate court's view of the other evidence. While it is difficult to compress the detailed examination of the courts below into a summary, perhaps examples will help explain what is meant in saying that from the appellate court's view of the evidence it would not be proper to send the case back for retrial:

> Example one: The Sawyer-Velva area. The appellate court noted that most of the Pan Am leases were taken outside of the area which the Hunts' secret information showed as having coal in commercial quantities. The appellate court then noted that the Ballantyne leases appeared to be based on public and legitimate information. The appellate court then continued to say that they saw "*no positive evidence in the record, either of a direct or circumstantial evidence, that supports the proposition that the Ballantynes used Hunt data in this area.*" (Emphasis supplied.) (Appendix 90-91)
>
> Example two: One of the next largest concentrations of Pan Am leases was in the Tioga area. The appellate court first noted that the great majority of those leases was purchased after receipt of legitimate information from the Sun Oil Company detailing the area's coal resources, and went on: "The Hunts' attack on the district court's ultimate finding of no liability is directed at the Ballantynes' early purchases * * * * The early Ballantyne leases in the Tioga area that were purchased before the receipt of the Sun Oil information were *all purchased before Todd started his employment with the Hunts.* Todd, then, was not a likely source from which the Ballantynes could acquire a Hunt map. *Moreover, at the time in issue, the Hunts had not established the buy area maps for the Tioga area.*" (Emphasis supplied.) (Appendix 91-92)



With findings like the above examples by the appellate court which sifted the evidence, it would be patently absurd to send the case back for a new trial to see if the district court would change its decision that: Pan Am's purchases were based on legitimate and independent information. (Findings of fact such as these given as examples above are certainly irrespective of any debate as to the "minimal" or "more than minimal" nature of Todd's access.)

The appellate court's affirmative findings were in agreement with those of the district court, that the Pan American leases were purchased because of legitimately acquired public information. The "bed-rock," basic finding of the trial court (on what it said at Transcript III, 40, was the ultimate issue) was that legitimate information was used, to wit:

> The Pan American leasing program was a flexible non-structured operation adopted in each area to the information Ballanynes were able to accumulate. It admittedly involved a great amount of guesswork. *But the pattern of leasing was based on reading public information, observing drilling activity in these areas, examining courthouse information, noting old or existing coal mines, visiting with the landowners and buying in between the majors.* (Emphasis supplied.) (Appendix 54)

That finding stands; the decision below is *not* clearly erroneous; and Hunts must fail in their appeals.

Rule 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous."

The point is that the appellate court does not consider the evidence de novo. This Court (in deciding a case which reached it on direct appeal) stated it thus:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cause to actions which the District Court apparently deemed innocent. . . . We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous." *U.S.* v. *National Association of Real Estate Boards*, 399 U.S. 485, 495-496 (1950).

If there is no causal connection between Hunt information and the Pan American leases, it is idle and moot to retry other factual issues. We respectfully suggest that when the 8th Circuit refused a request for a rehearing and refused a request for rehearing en banc, or for remanding the case to the trial court, that its decision was based upon a considered judgment as to whether it made sense to have the district court try the whole matter again (as plaintiffs would have us do). There was only one small item changed; which item judges thought made no difference as to their agreement with the trial court on other independent issues of fact (*e.g.*, causal relationships) which completely disposed of the case.

Hunts assert in their Petition for Writ of Certiorari that the appellate court found a second "clear error" on a threshold matter. They claim that that second "clear error" finding is in a statement of the appellate court that Abshire (a geologist who had certain data) must have been recording information from Hunt logs. Plain-



tiffs are wrong. We can expose this mistake of the plaintiffs in a rather startling manner, simply by quoting from the appellate decision as follows:

> The reasonable inference from the evidence is that *Abshire did not have Hunt logs.*
>
> * * * *
>
> *Again*, we *must infer* from this evidence that *Abshire did not have Hunt logs.* (Emphasis supplied.) (Appendix 107-108)

The above quotations from the appellate court flatly contradict what Hunts have said the appellate court found. A careful study of the 8th Circuit Opinion reveals:

1) The Opinion first reviews the argument that Abshire had Hunt logs. Hunts base the claim which they have presented to this Court, that the Circuit Court found that Abshire had Hunt logs, on the Circuit Court's recitation of *one side* of the argument.

2) After enumerating the arguments one way, the 8th Circuit Court goes on to say: "But this is not the only evidence on the issue." The 8th Circuit opinion then goes on to relate the evidence showing that Abshire did *not* have Hunt logs.

3) The 8th Circuit then concludes, "The evidence is conflicting. . . . We are not firmly convinced that the factual findings of the district court are erroneous."

In short, when Hunts assert that the 8th Circuit Court found the district court to be erroneous in its finding that Abshire did not have Hunt logs, the Hunts simply are wrong. In charity, we may assume that plaintiffs read the 8th Circuit Opinion hastily; and that they did not attempt to mislead this Court.

What we have said above illustrates the nature of this lawsuit. It was a factual conflict in which the trial court and the appellate court had to spend a considerable amount of time sifting through the evidence and weighing it to determine the significance of individual items presented to them. The panel of judges in the 8th Circuit took a substantial period of time to make what they thought was a rational and final disposition of this factual case.

**4. This is a case which turns on the trier of facts' assessment of the evidence; the case involves no national issues.**

Rule 19 of the Rules of this Court provides that a review or writ of certiorari "will be granted only where there are special and important reasons therefor." There are no special and important reasons for review in this case. Certainly, there is nothing of national significance.

Hunts make no claim that the 8th Circuit has rendered a decision in conflict with the decision of another court of appeals. Indeed, both the trial court below and the 8th Circuit specified their accord with the 5th Circuit case of *Hunter* v. *Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952).

Hunts make no claim that there is any important question of federal law involved. This is simply a diversity action which could just as well have been brought in the state courts of North Dakota, since only North Dakota law is involved.

The Hunts' only claim is that the Supreme Court's power of supervision is needed because all of the judges below really don't understand the issues in the case. To quote the words of Hunts' petition to this court, at page 10:

> . . . the courts below apparently felt no need to carefully formulate the issues. They did not, in fact, ever define or address the true issues in this cause.



There is no claim that the "true issues" are issues of national gravity and importance.

We respectfully suggest that the courts below did understand the issues in the case. Although we may be prejudiced, we feel that plaintiffs continue to ignore evidence which does not suit them. Hunts only look at half the evidence and then come to the conclusion that all the judges below "felt no need . . . to address the true issues."

On the other side, we agree with the 8th Circuit Decision which states (Appendix 81):

> The District Court's unreported memorandum of decision and order evinces a thorough and even-handed consideration of the evidence presented by the parties.

The 8th Circuit judges spent long hours sifting through the mountain of evidence, and we feel the Circuit Court's characterization of the trial court's findings is more objective than Hunts' portrayal of the trial court.

This is not an important case in a national sense. This is simply a factual case with a disappointed plaintiff.

The superintending power of the Supreme Court is not needed [1] because the case rests simply on a decision in a

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[1] It has also been waived by Hunts. The Hunts now, under the doctrine of some courts, can no longer appeal nor seek a writ of certiorari. After the 8th Circuit Court decision, the Hunts paid the thousands of dollars of the costs judgment against them voluntarily and without any demand by the defendants for such payment. Voluntary payment of a cost judgment is acquiescence in the judgment below and waives the right of appeal. See, *Bell* v. *Great Atlantic and Pacific Tea Company*, 132 N.W.2d 358 (Iowa 1965). This Court should adopt that rule for the federal courts, and refuse a writ to anyone who has voluntarily and without demand paid the judgment below.

purely factual matter. Certainly, if a jury had been given special interrogatories and it had affirmatively stated that there was no proximate cause between any act of the defendant and the matter complained of, we would not order the jury back to consider additional items to see whether they might eventually come out with a judgment for the plaintiff. The refusal of the trial court to submit certain questions to the jury for determination will not ordinarily sustain a petition for writ of certiorari from the United States Supreme Court, where the propriety of submitting these questions depends essentially upon an appreciation of the evidence. *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918) (dismissing writ of certiorari after arguments to Supreme Court.) This doctrine may be applied by analogy to this case, where the issues to be discussed depend essentially upon an appreciation of the evidence by the finder of fact.

Jurisdiction to bring up cases by writs of certiorari from the circuit courts was conferred upon the Supreme Court for two purposes: first, to secure a uniformity of decisions between the appellate courts; and second, to bring up questions of importance which it is in the public interest to have decided nationally. *Magnum Import Co.* v. *Coty*, 262 U.S. 159 (1923). The Supreme Court will not ordinarily grant certiorari to review questions of fact. *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U.S. 175 (1938). This discretion vested in the United States Supreme Court to review the decisions of the Circuit Court of Appeals by certiorari will only be exercised in matters of gravity and general national importance. *In re Woods*, 143 U.S. 202 (1892).

This case is a factual case and can hardly be classified as one of national importance. Plaintiffs had a fair trial on the facts and a fair review of the facts on appeal. Review of fact finding is not the job of the United States Supreme Court.



For the United States Supreme Court to spend its time screening a long, involved factual record to see if the appellate and trial courts were wrong in saying, *e.g.*, that they saw "no positive evidence in the record, either of a direct or circumstantial nature, that supports the proposition that the Ballantynes used Hunt data in the area," is to turn the United States Supreme Court into a mere sifter of fact on fact issues.

## CONCLUSION

The trial court carefully considered the evidence and made findings as to the credibility of the witnesses, the importance of certain items of evidence, and the inferences to be drawn from the evidence. The appellate court addressed itself to the limited issues presented to it, and the specific relief sought from it. After exhaustive review of the facts and the thousands of documents, the appellate court found the trial court decision to be sound. The plaintiffs have had a fair review on appeal.

Factual determinations independently dispose of the case; and there are no questions of national significance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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